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## **Poe v. Haw. Labor Rels. Bd.**

Supreme Court of Hawai'i

July 21, 2004, Decided

NO. 24073

### **Reporter**

105 Haw. 97 \*; 94 P.3d 652 \*\*; 2004 Haw. LEXIS 469 \*\*\*; 175 L.R.R.M. 2422

LEWIS W. POE, Complainant/Appellant-Appellant, vs. HAWAII LABOR RELATIONS BOARD, State of Hawai'i, Appellee-Appellee, and BENJAMIN J. CAYETANO, Governor, State of Hawai'i, Respondent/Appellee-Appellee. LEWIS W. POE, Complainant/Appellant-Appellant, vs. HAWAII LABOR RELATIONS BOARD, State of Hawai'i, Appellee-Appellee, and BENJAMIN J. CAYETANO, Governor, State of Hawai'i, Respondent/Appellee-Appellee. LEWIS W. POE, Complainant/Appellant-Appellant, vs. HAWAII LABOR RELATIONS BOARD, State of Hawai'i, Appellee-Appellee, and DAVIS YOGI, Director, Department of Human Resources Development, State of Hawai'i; KAZU HAYASHIDA, Director, Department of Transportation, State of Hawai'i; THOMAS FUJIKAWA, Harbors Administrator, State of Hawai'i, Respondents/Appellees-Appellees. LEWIS W. POE, Complainant/Appellant-Appellant, vs. HAWAII LABOR RELATIONS BOARD, State of Hawai'i, Appellee-Appellee, and KAZU HAYASHIDA, Director, Department of Transportation, State of Hawai'i, Respondent/Appellee-Appellee. LEWIS W. POE, Complainant/Appellant-Appellant, vs. HAWAII LABOR RELATIONS BOARD, State of Hawai'i, Appellee-Appellee, and DAVIS YOGI, Director, Department of Human Resources Development, State of Hawai'i, Respondents/Appellees-Appellees.

**Prior History:** [\*\*\*1] APPEAL FROM THE FIRST CIRCUIT COURT. CIV. NOS. 00-1-1867, 00-1-1868, 00-1-2199, 00-1-2200, & 00-1-2349.

**Disposition:** Affirmed.

### **Core Terms**

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grievance, arbitration, exhaust, fair representation, collective bargaining agreement, breached, contract remedy, grievance procedure, working day, bargaining, grievant, circuit court, reply, complaints, designee, remedies

### **Case Summary**

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#### **Procedural Posture**

The First Circuit Court (Hawaii) affirmed the dismissal of complainant union member's five consolidated prohibited practice complaints by appellee Hawai'i Labor Relations Board (the Board). The union member appealed.

## Overview

On appeal, the union member contended the circuit court erred in affirming the Board's decision because the Board had incorrectly determined he (1) failed to exhaust his remedies under the collective bargaining agreement; and (2) failed to prove the union breached its duty of fair representation. The final stages of the grievance procedure required the union to advance the union member's claim to arbitration. Because the union member could move no further in the grievance procedure, he had exhausted his administrative remedies. Thus, the Board was wrong in concluding he had failed to exhaust his administrative remedies. Regarding four of his claims, he failed to establish that he was prevented from exhausting his contractual remedies because he did not request that the union advance them to arbitration. With respect to his fifth claim, he was prevented from exhausting his contractual remedies because the union denied his request to advance his grievance to arbitration. However, he did not prove the union breached its duty of fair representation, conceding he could not prove the union breached this duty. Therefore, he lacked standing to pursue his claim before the Board.

## Outcome

The judgment was affirmed.

## LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Administrative Law > Agency Adjudication > Review of Initial Decisions

### [HN1](#) [↓] **Judicial Review, Standards of Review**

Review of a decision made by a circuit court upon its review of an agency's decision is a secondary appeal.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Real Property Law > Zoning > Judicial Review

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Environmental Law > Land Use & Zoning > Judicial Review

### [HN2](#) [↓] **Standards of Review, Clearly Erroneous Review**

Upon review of the record, an appellate court may affirm the decision of an agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedure; or (4) Affected by other error of law; or (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. An agency's findings are not clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made. Conclusions of law are freely reviewable under a right/wrong standard.

Governments > Federal  
Government > Employees & Officials

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Governments > Courts > Judicial Precedent

Governments > Federal  
Government > Claims By & Against

### [HN3](#) **Federal Government, Employees & Officials**

The Supreme Court of Hawaii has used federal precedent to guide its interpretation of

state public employment law. Based on federal precedent, an employee must exhaust any grievance procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement. The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process, allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

### [HN4](#) **Collective Bargaining & Labor Relations, Duty of Fair Representation**

A labor union is charged with the duty of protecting the interests of its members as a group, and a union's interests are therefore broader than those of any one of its members. When the interest of members of the bargaining unit are not identical, a union may be unable to achieve complete satisfaction of everyone. It is granted a wide range of reasonableness so long as it acts with complete good faith and honesty of purpose. Thus, an employee does not have an absolute right to have the union pursue his or her claims in the grievance process.

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Labor & Employment Law > Collective Bargaining & Labor Relations > Interpretation of Agreements

### [HN5](#) **Alternative Dispute Resolution, Arbitration**

A labor union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, but the individual employee does not have an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as co-author of the bargaining agreement in representing the employees in the enforcement of that agreement.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > ... > Alternative Dispute

Resolution > Arbitration > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

### [HN6](#) **Alternative Dispute Resolution, Mandatory ADR**

If an individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the union contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > Contractual Remedies

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

### [HN7](#) **Exhaustion of Remedies, Contractual Remedies**

When a labor union wrongfully refuses to pursue an individual grievance, the employee is not left without recourse. Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Civil  
Procedure > ... > Justiciability > Exhaustion of Remedies > Contractual Remedies

Labor & Employment Law > Wrongful Termination > Defenses > General Overview

Civil  
Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

### **[HN8](#) [↓] Causes of Action & Remedies, Breach of Contract**

A wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that his labor union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

Contracts Law > Breach > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

Civil  
Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Labor & Employment Law > Employer Liability > Contract Liability > General Overview

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

### **[HN9](#) [↓] Contracts Law, Breach**

An employee who is prevented from exhausting the remedies provided by a collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation. The two claims are inextricably interdependent. To prevail against either the company or the union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.



Civil

Procedure > ... > Justiciability > Exhaustion of Remedies > Contractual Remedies

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

Civil

Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

### [HN10](#) **Exhaustion of Remedies, Contractual Remedies**

A union member may bring suit when the union has the sole power under the contract to invoke the higher stages of the grievance procedure, and the member is prevented from exhausting his or her contractual remedies by the unions wrongful refusal to process a grievance.

Civil

Procedure > ... > Justiciability > Exhaustion of Remedies > Contractual Remedies

Contracts Law > Breach > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Civil

Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements > Exhaustion of Remedies

Labor & Employment Law > Employment Relationships > Employment Contracts > Breaches

### [HN11](#) **Exhaustion of Remedies, Contractual Remedies**

A union member who is prevented from exhausting his or her contractual remedies may bring an action against an employer for breach of a collective bargaining agreement provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

Labor & Employment Law > Collective Bargaining & Labor Relations > Duty of Fair Representation

### [HN12](#) **Collective Bargaining & Labor Relations, Duty of Fair Representation**

A union breaches its duty of good faith when its conduct towards a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith. Merely settling a grievance short of the arbitration process, without more, fails to establish a breach of the duty of fair representation.

**Counsel:** On the briefs:

Lewis W. Poe, complainant/appellant-

appellant, appearing Pro se.

## I. BACKGROUND

Valri Lei Kunimoto, for appellee-appellee  
Hawai'i Labor Relations Board.

Kathleen N. A. Watanabe and Sarah R.  
Hirakami, Deputy Attorneys General, for  
respondents/appellees-appellees.

**Judges:** MOON, C.J., LEVINSON,  
NAKAYAMA, ACOBA, AND DUFFY, JJ.

**Opinion by:** MOON

## Opinion

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**[\*\*653] [\*98] OPINION OF THE COURT  
BY, C.J.**

Complainant-appellant Lewis W. Poe appeals from the January 9, 2001 judgment of the Circuit Court of the First Circuit, the Honorable Eden Elizabeth Hifo presiding, affirming the dismissal of Poe's five consolidated prohibited practice complaints by appellee Hawai'i Labor Relations Board [hereinafter, HLRB or the Board]. On appeal, Poe contends that the circuit court erred in affirming the decision of the HLRB because the Board had incorrectly determined that Poe (1) failed to exhaust his remedies under **[\*\*654] [\*99]** the applicable collective bargaining agreement and (2) failed to prove that his union, the Hawai'i Governmental Employees Association (HGEA) breached its duty of fair **[\*\*\*2]** representation with respect to Poe's grievances. For the following reasons, we affirm the circuit court's decision.

### A. Facts

Poe was employed by respondent-appellee State of Hawai'i (Employer) as a Tower Operator I at Aloha Tower. His duties included controlling the movement of marine traffic through Honolulu Harbor.

### 1. The Collective Bargaining Agreement

As a member of Bargaining Unit 3 (BU 03) of HGEA, Poe was bound by the terms of the collective bargaining agreement between Employer and HGEA. The Memorandum of Agreement appended to the collective bargaining agreement, in force from August 2, 1995 through the germane time periods in this case, stated in relevant part:

#### ARTICLE 11 - GRIEVANCE PROCEDURE

A. Any complaint by an Employee or the Union concerning the application and interpretation of this Agreement shall be subject to the grievance procedure. . . .

B. An individual Employee may present a grievance [to the Employee's immediate supervisor, and have the grievance heard] without intervention of the Union, up to and including Step 3, provided the Union has been afforded an opportunity to be present at the [conference(s)] meeting(s) on the grievance. **[\*\*\*3]** . . .

C. Informal Step. A grievance shall, whenever possible, be discussed informally between the Employee and the immediate supervisor . . . . The [grievant] Employee may be assisted by a Union representative. If the immediate supervisor does not reply by seven (7) working days, the Employee or the Union may pursue the grievance to the next step.

D. Step 1. If the [grievant] is not satisfied with

the result of the informal conference] grievance is not satisfactorily resolved at the informal step, the [grievant] Employee or the Union may submit a written statement of the grievance within seven (7) working days after [receiving the answers] receipt of the reply to the informal complaint to the division head or designee . . . .

A meeting to discuss the grievance shall be held (between the grievant and a Union representative with the division head or designee) within seven (7) working days after receipt of the written grievance [is received]. . .

E. Step 2. If the grievance is not satisfactorily resolved at Step 1, the [grievant] Employee or the Union may appeal the grievance in writing to the department head or designee within seven (7) working days after [receiving **\*\*\*4**] the written answer] receipt of the reply at Step 1. . . .

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. . . .

. . . .

G. Step 3. If the grievance is not satisfactorily resolved at Step 2, the [grievant] Employee or the Union may appeal the grievance in writing to the Employer or designee within seven (7) working days after receipt of the [answer] reply at Step 2. . . .

A meeting to discuss the grievance shall be held within seven (7) working days after receipt of the appeal. The Employer or designee shall reply in writing to the [grievant or] Employee and within seven (7) working days after the meeting.

H. Step 4. Arbitration. If the grievance is not satisfactorily resolved at Step 3 and the Union desires to proceed with arbitration, it shall serve written notice on the Employer or

designated representative of its desire to arbitrate within (10) working days after receipt of the [Employer's decision] reply at Step 3. . .

(Internal brackets and underscoring in original.)

## **[\*\*655] [\*100] 2. Poe's Grievances**

Poe filed five grievances with his employer, alleging that the employer had violated the collective bargaining **\*\*\*5** agreement in various ways. In every case, Poe, without the assistance of his union, pursued his grievances through Step 3 of the grievance procedure. Each time, Poe was not satisfied with the result. In one of the five grievances giving rise to the present appeal, Poe requested that his union sponsor his complaint at Step 4 arbitration. The union declined on the basis that Poe's grievance lacked merit. In the other four grievances, Poe did not request arbitration prior to filing suit.

### **B. Prior Proceedings**

Poe subsequently filed five prohibited practice complaints with the HLRB, based on the same collective bargaining agreement violations alleged in the grievance procedure.<sup>1</sup> Each of Poe's complaints were dismissed by the HLRB, essentially concluding each time that:

Complainant must exhaust his available contractual remedies prior to bringing a prohibited practice complaint against the Employer alleging a violation of the collective bargaining agreement. In order to maintain an action against his Employer alleging a breach of the collective bargaining agreement, Complainant must

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<sup>1</sup> Poe's five prohibited practice complaints were filed separately in Civil Nos. 00-1-1867, 00-1-1868, 00-1-2199, 00-1-2200, 00-1-2349. He alleged, inter alia, that the State had violated the CBA in subjects such as overpayment in night differential pay, break times during work shifts, requiring use of a computer at work, and failure to respond to information.



establish that the union breached its duty of fair representation in failing to pursue his grievance [\*\*\*6] to arbitration. Absent such a claim, the Board hereby dismisses the instant complaint for failure to exhaust contractual remedies.

Poe then appealed to the circuit court, alleging that the HLRB erred because he had indeed exhausted his contractual remedies under the collective bargaining agreement. On October 19, 2000, the circuit court consolidated all of Poe's five complaints and affirmed each of the HLRB's dismissals in one order. Judgment was entered on January 9, 2001. Poe timely appealed on February 8, 2001.

## II. STANDARDS OF REVIEW

**HN1**<sup>[↑]</sup> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. [\*\*\*7] Steinberg v. Hoshijo, 88 Hawai'i 10, 15, 960 P.2d 1218, 1223 (1998). Hawai'i Revised Statutes (HRS) § 91-14(g) (1993) provides:

**HN2**<sup>[↑]</sup> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"An agency's findings are not clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made." Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 229-30, 751 P.2d 1031, 1034 (1988). [\*\*\*8]

Conclusions of law are freely reviewable under a right/wrong standard. Poe v. Hawai'i Labor Relations Bd., 97 Hawai'i 528, 535, 40 P.3d 930, 937 (2002) [hereinafter, Poe I].

## III. DISCUSSION

Poe contends that the circuit court erred in affirming the decision of the HLRB because the Board incorrectly determined [\*\*656] [\*101] that Poe had failed to exhaust his remedies under the collective bargaining agreement. HLRB and Employer argue, inter alia, that Poe's suit was barred because he failed to prove that HGEA breached its duty of fair representation in not advancing Poe's claims through Step 3 arbitration.

**HN3**<sup>[↑]</sup> This court has used federal precedent to guide its interpretation of state public employment law. Hokama v. Univ. of Hawai'i, 92 Hawai'i 268, 272 n.5, 990 P.2d 1150, 1154 n.5 (1999); see also Poe I, 97 Hawai'i at 536-37, 40 P.3d at 938-39; Santos v. State Dep't. of Transp., 64 Haw. 648, 655, 646 P.2d 962, 967 (1982). Based on federal precedent, we have held it "well-settled that an employee must exhaust any grievance . . . procedures provided under a collective bargaining agreement before bringing a court action pursuant to the agreement. [\*\*\*9] " Hokama, 92 Hawai'i at 272, 990 P.2d at 1154 (citing, inter alia, Santos, 64 Haw. at 655, 646 P.2d at 967; DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 163-64, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983)). "The exhaustion requirement, first, preserves the integrity and autonomy of the collective bargaining process,

allowing parties to develop their own uniform mechanism of dispute resolution. It also promotes judicial efficiency by encouraging the orderly and less time-consuming settlement of disputes through alternative means." [\*Hokama, 92 Hawai'i at 272, 990 P.2d at 1154\*](#) (citations omitted).

The final stages of the grievance procedure in the instant case requires the union to advance the employee's claim. [HN4\[↑\]](#) "A labor union is charged with the duty of protecting the interests of its members as a group, and a union's interests are therefore broader than those of any one of its members." [\*Taylor v. Southwestern Bell Tel. Co., 251 F.3d 735, 741 \(8th Cir. 2001\)\*](#) (citing [\*United States v. White, 322 U.S. 694, 701-02, 88 L. Ed. 1542, 64 S. Ct. 1248 \(1944\)\*](#); [\*Vaca v. Sipes, 386 U.S. 171, 177, 17 L. Ed. 2d 842, 87 S. Ct. 903 \(1967\)\*](#)); see also [HRS § 89-8 \[\\*\\*\\*10\]](#) (1993) (providing that the union, as the exclusive representative "shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership[]"). "When the interest of members of the bargaining unit are not identical, a union may be unable to achieve complete satisfaction of everyone. It is granted a 'wide range of reasonableness' so long as it acts with 'complete good faith and honesty of purpose.'" [\*Smith v. Local 7898, United Steelworkers of Am., 834 F.2d 93, 96 \(4th Cir. 1987\)\*](#) (quoting [\*Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 97 L. Ed. 1048, 73 S. Ct. 681 \(1953\)\*](#)). Thus, an employee does not have an absolute right to have the union pursue his or her claims in the grievance process. [\*Vaca, 386 U.S. at 191\*](#). As the Supreme Court observed:

Though we accept the proposition that [HN5\[↑\]](#) a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion,

we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless [\*\*\*11] of the provisions of the applicable collective bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.

[HN6\[↑\]](#) If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries [\*\*\*12] of independent and unsystematic negotiation. Moreover, under such a rule, [\*\*657] [\*102] a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

[Id. at 191-92](#) (footnote and citations omitted).

However, [HN7\[↑\]](#) when the union wrongfully refuses to pursue an individual grievance, the employee is not left without recourse.

Exceptions to the exhaustion requirement exist, such as when pursuing the contractual remedy would be futile. Poe I, 97 Hawai'i at 536-37, 40 P.3d at 938-39 (citing Vaca, 386 U.S. at 186; Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324, 330-31, 21 L. Ed. 2d 519, 89 S. Ct. 548 (1969); Am. Fed'n of Gov't Employees v. Paine, 141 U.S. App. D.C. 152, 436 F.2d 882, 896 (D.C. Cir. 1970)). In *Vaca*, the Supreme Court noted:

[A] situation when the employee may seek judicial enforcement of his contractual rights arises, if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, [\*\*\*13] the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstance would, in our opinion, be a great injustice. . . .

For these reasons, we think HN8<sup>↑</sup> the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance.

386 U.S. at 185-86 (emphases added) (citation omitted).

Thus, HN9<sup>↑</sup> an employee who is prevented

from exhausting the remedies provided by the [\*\*\*14] collective bargaining agreement may, nevertheless, bring an action against his or her employer. Under federal precedent, such an action consists of two separate claims: (1) a claim against the employer alleging a breach of the collective bargaining agreement and (2) a claim against the union for breach of the duty of fair representation. DelCostello, 462 U.S. at 164.

The two claims are inextricably interdependent. To prevail against either the company or the Union, employee-plaintiffs must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Id. at 164-65 (citation, brackets, quotation marks, and ellipsis points omitted); see also DiGuilio v. Rhode Island Bhd. of Corr. Officers, 819 A.2d 1271, 1273 (R.I. 2003) (without a showing that the union breached its duty of fair representation, the employee does not have any standing to contest the merits of his contract claim against the employer in court).

Other state [\*\*\*15] jurisdictions also require that an employee prove the union breached its duty of fair representation in order to obtain a judicial remedy when a union declines to arbitrate an employee's grievance. See, e.g., DiGuilio, 819 A.2d at 1273; Mahnke v. Wisconsin Employment Relations Comm'n, 66 Wis. 2d 524, 225 N.W.2d 617, 622-23 (Wis. 1975). In *DiGuilio*, a senior employee nurse filed a grievance with her public employer, the Department of Corrections, over being wrongfully passed over for promotion in favor of a junior employee. 819 A.2d at 1272. Under the collective bargaining agreement, the union had the exclusive unilateral discretion to take a

grievance to arbitration. *Id.* The employee requested that the union participate **[\*\*658]** **[\*103]** in arbitration on her behalf, and the union declined. *Id.* She then filed in action in court against her employer, recapitulating her grievance. *Id.* The employee did not allege or prove that her union breached its duty of fair representation. *Id. at 1273.* The Supreme Court of Rhode Island, adopting the federal rule outlined in *Hines*, *Ayala*, and *DelCostello*, held that the employee had no standing to sue because she did **[\*\*\*16]** not establish that the union's failure to arbitrate her grievance amounted to unfair representation. *Id. at 1273-74*; accord *Mahnke, 225 N.W.2d at 623.* The court stated that allowing the employee to sue would be contrary to the collective bargaining agreement's intent to set arbitration, invoked by the union, as the exclusive remedy for breach of contract grievances brought by an employee, thus having the undesirable effect of "taking decisions affecting the rights and status of union employees out of the hands of unions and arbitrators and placing them into the judicial forum." *DiGuilio, 819 A.2d at 1273-74.*

In *Poe I*, this court held that the HLRB erred in concluding that *Poe* had failed to exhaust his administrative remedies,<sup>2</sup> but went on to hold that, under the undisputed facts of the case, *Poe* was not entitled to any relief because the substance of his claims lacked merit. *97 Hawai'i at 538-39, 40 P.3d at 940-41.* Although this court's opinion in *Poe I* cited federal cases

for the proposition that exceptions to the exhaustion requirement exist, it had no occasion to address the requirement under federal law that the employee demonstrate **[\*\*\*17]** that the union breached its duty of fair representation in order to bring a claim that the employer breached its duty of fair representation. However, this court has, in prior cases, alluded to the duty of fair representation. *Santos* concerned a grievance by the appellant regarding the promotion of a co-worker:

At the heart of appellant's complaint is the allegation that the State wrongfully appointed [a co-worker] to the Equipment Operator IV position over appellant when appellant was more qualified, and that the UPW denied appellant fair representation, thus excusing appellant from resorting to the contractual grievance procedure before instituting an action in court.

*64 Haw. at 654, 646 P.2d at 966.* In determining that the appellant's claims on appeal were barred by collateral estoppel, this court noted that, "before [the Hawai'i Public Employment Relations Board (HPERB)] could act on a complaint against the State when the grievance procedures were not utilized, HPERB was required to and did properly consider whether the UPW had acted to deny appellant fair representation, thus, making resort to the grievance procedure an inadequate or futile remedy." *Id. at 656-57, 646 P.2d at 968.* **[\*\*\*18]** Additionally, in *Poe I*, this court noted that, under *Vaca*, *HN10*<sup>↑</sup> a union member may bring suit when the union has the sole power under the contract to invoke the higher stages of the grievance procedure, and the member is prevented from exhausting his or her contractual remedies by the unions' wrongful refusal to process a grievance[.]

*97 Hawai'i at 536-37, 40 P.3d at 938-39*

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<sup>2</sup> Specifically, this court stated: When only the exclusive bargaining representative can elect to advance to the final grievance step, the employee exhausts his or her remedies at the point in the grievance procedure where the employee can no longer progress. Because *Poe* could move no further in the grievance procedure, he had exhausted his administrative remedies. Requiring him to repeatedly request the HGEA to pursue his grievance would be futile. Thus, the HLRB was wrong in concluding that *Poe* had failed to exhaust his administrative remedies. *97 Hawai'i at 538, 40 P.3d at 940* (citation omitted).



(emphasis [\*\*\*19] added).

Based on analogous federal cases previously cited by this court and the policy considerations articulated in them, we hold that [HN11](#)<sup>[↑]</sup> an employee who is prevented from exhausting his or her contractual remedies may bring an action against an employer for breach of a collective bargaining agreement "provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the [\*\*659] [\*104] employee's grievance." [Vaca, 386 U.S. at 186](#).

[HN12](#)<sup>[↑]</sup> A union breaches its duty of good faith when its conduct towards a member of a collective bargaining unit is arbitrary, discriminatory, or in bad faith. [Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44, 142 L. Ed. 2d 242, 119 S. Ct. 292 \(1998\); DelCostello, 462 U.S. at 164; Vaca, 386 U.S. at 190](#). Merely settling a grievance short of the arbitration process, without more, fails to establish a breach of the duty of fair representation. [Vaca, 386 U.S. at 192](#).

In the present case, with respect to four of Poe's claims, he fails to establish that he was prevented from exhausting his contractual remedies because he did not request that HGEA advance those claims to [\*\*\*20] Step 4 arbitration. With respect to Poe's fifth claim, he was prevented from exhausting his contractual remedies because HGEA denied his request to advance his grievance at arbitration. However, as in [DiGiulio](#), Poe did not prove that his union breached its duty of fair representation, and, in fact, concedes that he cannot prove that the union breached this duty. Therefore, we hold that Poe lacked standing to pursue his claim before the HLRB. See [DiGiulio, 819 A.2d at 1273-74](#).

#### IV. CONCLUSION

Based on the foregoing, we conclude that Poe

lacked standing to pursue his claim before the HLRB because he failed to demonstrate that his union breached the duty of fair representation. We, therefore, hold that the HLRB did not err in dismissing his claim because he failed to exhaust his contractual remedies. Accordingly, we affirm the circuit court's judgment affirming the HLRB.

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